No. 15963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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Claire B. Morse,

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BRIEF FOR THE APPELLEE.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 47-57] are not officially reported.

Jurisdiction.

This appeal involves transferee liability for unpaid corporate income and excess profits taxes which were assessed for the calendar year 1942 and for the period January 1, 1943, through April 30, 1943. [R. 12, 48-49, 53.] The appellant, who is a transferee, and hereinafter referred to as the taxpayer, commenced a suit to enjoin the District Director from collecting the assessed tax. [R. 48.] The United States intervened under the

authority of Section 7401, Internal Revenue Code of 1954, to recover the assessed taxes from the taxpayer. [R. 48.][1] Jurisdiction was conferred on the District Court under 28 U. S. C., Sections 1340 and 1345. The judgment of the District Court was entered on February 17, 1958. [R. 58.] Within sixty days, or on March 7, 1958, taxpayer's notice of appeal was filed. [R. 71.] Jurisdiction is conferred on this Court under 28 U. S. C., Section 1291.

Question Presented.

Whether taxpayer is liable as a transferee under Section 311, Internal Revenue Code of 1939, where in an exchange for her corporate stock she received, in accordance with a partnership agreement which she ratified, a 10% interest in the partnership to which all the corporate assets were transferred.

Statute and Regulations Involved.

Internal Revenue Code of 1939:

Sec. 311. Transferred assets.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer,

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[1]The parties have stipulated that the injunction action is now moot and this proceeding is reduced to the action in intervention. [R. 19.]

in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * * * * *

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * * * * *

(26 U. S. C., 1952 ed., Sec. 311.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.311-1. *Claims in Cases of Transferred Assets.*— * * *

The term "transferee" as used in this section includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 112, and all other classes of distributees.

* * * * * * * *

Statement.

The facts as found by the District Court may be stated as follows:

Taxpayer, Claire B. Morse, commenced a suit to enjoin the collection of the taxes which had been assessed against her as a transferee. The United States intervened, pursuant to the authorization of the Commissioner of Internal Revenue and the direction of the Attorney General of the United States, to collect the taxes from taxpayer. [R. 48-49.] As noted above, the parties have

stipulated that the injunction action is now moot and this proceeding is reduced to the action in intervention. [R. 19.]

The Commissioner of Internal Revenue made an assessment against Borin Art Products Corporation, an Illinios corporation, of declared value excess profits tax and excess profits tax, penalties and interest, for the calendar year 1942 and for the period January 1, 1943, through April 30, 1943, in the amount of $110,334.07 and over-assessment in income tax in the amount of $2,046.98. No part of the assessment was paid by the corporation. [R. 49.]

On April 30, 1943, the Borin Art Products Corporation was dissolved and on or about that date, all the assets of the corporation were transferred to a partnership, Borin Art Products Company. [R. 49.]

Upon the dissolution of the Borin Art Products Corporation, taxpayer did not receive directly any of the money, property or assets of the corporation but received for her interest of 80 shares in the corporation a 10% interest in the partnership Borin Art Products Company. Under the partnership agreement dated May 1, 1943, which created the partnership of Borin Art Products Company, taxpayer was one of the limited partners named therein and the agreed value of the 10% interest which she received in the partnership was $12,000. [R. 49-50.]

Timely consents extending the period of limitations upon assessment of liability at law or in equity against a transferee were executed by taxpayer. The last consent, dated December 4, 1947, extended the period of limitations to June 30, 1951. [R. 50.]

On or about February 8, 1946, taxpayer executed a transferee agreement which was as follows [R. 50-51]:

Transferee Agreement

Date February 8, 1946

In consideration of the Commissioner of Internal Revenue not issuing a statutory notice of deficiency to and making an assessment against Borin Art Products Corporation, incorporated under the laws of the State of Illinois on September 15, 1932, the undersigned, Claire Borin, admits that he (or she) is a transferee of the assets of said Borin Art Products Corporation and assumes and agrees to pay the amount of any and all Federal income, excess-profits, or profits taxes finally determined or adjudged as due and payable by the Borin Art Products Corporation for the taxable year ended December 31, 1942, to the extent of her liability as transferee under the Internal Revenue Code.

The undersigned further agrees (1) not to contest or deny in court or otherwise liability as transferee, (2) in the absence of the prior written consent of the Commissioner, not to sell, transfer, or assign without adequate consideration all or any substantial portion of his (or her) assets, (3) upon request of the Commissioner, to execute consents in writing extending the period of limitation for assessment.

Claire B. Borin,

Transferee.

On or about February 8, 1946, taxpayer executed another transferee agreement, similar in all respects to the one set forth above, except that it covered the taxable period January 1, 1943, to April 30, 1943, of the Borin Art Products Corporation. Both agreements were delivered to the Government which accepted the agreements and relied thereon. [R. 51.]

On or about March 19, 1951, taxpayer executed Form 874 [Ex. Z]—"Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment." [R. 52.]

The form contained the following amounts and statement [R. 52]:

Deficiencies:

$ 9,746.78	for the year 1942.
2,822.72	for the period January 1, 1943 to April 30, 1943
$12,569.50	

Overassessment:

$ 1,490.02	for the year 1942.
373.79	for the period January 1, 1943 to April 30, 1943
$ 1,863.81	

"Represents undersigned's liability as a transferee of assets of Borin Art Products Corporation, Transferor, for income and excess profits taxes due from said Borin Art Products Corporation, Transferor."

On June 15, 1951, the Commissioner of Internal Revenue assessed against taxpayer, as transferee of the assets of Borin Art Products Corporation, deficiencies in taxes of the corporation in amounts as follows:

Taxable Period: Year 1942. Amount Assessed: $11,177.24. Date of Assessment: June 15, 1951. Dates, Notice and Demands: June 25, 1951. Unpaid Balance: $11,177.24. Taxable Period: Jan. 1, 1943, thru Apr. 30, 1943. Amount Assessed: $3,588.89.

Date of Assessment: June 15, 1951. Dates, Notice and Demands: June 26, 1951. Unpaid Balance: $3,588.89.

No part of any of the unpaid balances has been paid. [R. 53.]

The complaint in intervention was filed on May 31, 1957. [R. 53.]

Upon dissolution of Borin Art Products Corporation, as hereinabove set forth, the corporation was, and is, without property or things of value. [R. 53.]

The partnership agreement hereinabove referred to was not personally signed by taxpayer, nor did she authorize anyone to sign it for her at the time of its execution, but subsequent to the execution of the partnership agreement, she recognized and ratified the partnership agreement, and became obligated thereunder, as fully as though she had personally placed her signature thereon at the time of its execution. [R. 53.]

On or about February 8, 1946, taxpayer signed and verified a complaint [Ex. T] for dissolution of the partnership, Borin Art Products Company. The complaint was entitled "Complaint in Chancery for Dissolution of Parnership, Accounting, and Other Relief." The complaint alleged that taxpayer entered the partnership agreement dated May 1, 1943, and that the agreement was duly recorded in the office of the Recorder of Deeds of Cook County, Illinois. Taxpayer also alleged a 10% interest in the claims and causes of action of the partnership against certain insurance companies. [R. 53-54.]

Taxpayer signed Form 1040, United States individual income tax return, for the year 1944 in blank. The return reported only one item of income which was tax-

payer's distributable share, in the amount of $32,239.42, of the partnership income of Borin Art Products Company. The tax liability of $14,925.62 as shown on the return was paid. Taxpayer did not sign the Form 1040, United States individual income tax return for the year 1945. Her name was placed on the form by someone else without her knowledge. She did not have knowledge of its contents nor did she have knowledge of its filing at that time. The return reported only one item of income which was taxpayer's distributable share, in the amount of $46,028.35, of the partnership income of Borin Art Products Company. The tax liability of $26,596.39 as shown on the return was paid. [R. 54-55.]

During the period May 1, 1943, to termination of the partnership, no part of the monies, property or other assets belonging to the partnership, Borin Art Products Company, was distributed to taxpayer, nor did she withdraw any part of her distributable share of income as a partner of the partnership. [R. 55.]

The liability of taxpayer, Claire B. Morse, as transferee of the assets of Borin Art Products Corporation, to the United States of America is limited to $12,000, the agreed value of the taxpayer's 10% interest in the partnership, Borin Art Products Company, as set forth in the partnership agreement dated May 1, 1943. [R. 55.]

At all times pertinent herein, taxpayer negotiated with the Internal Revenue Service through her attorneys or accountants concerning all matters pertaining to the transferee liability herein involved and followed their advice and recommendations in signing all documents, agreements, extensions, waivers, etc., pertaining to the liability. [R. 55.]

The District Court held that taxpayer was liable as a transferee, that the assessment against her as a transferee was validly made within the period of limitations as extended in writing and that taxpayer's liability as a transferee was limited to $12,000, the agreed value of her interest in the partnership. [R. 56-57.]

Summary of Argument.

A transferee of a taxpayer's property is liable, under Section 311, of the Internal Revenue Code of 1939, at law or in equity, for the tax owed by the transferor to the extent of value of property received by the transferee. The transferee's liability is determined by state law. Here the applicable state law is that of Illinois as both parties agree.

The burden of proving transferee liability is on the Government. A *prima facie* case is established when the Government proves that there was a transfer of property without adequate consideration, that as a result of the transfer, the transferor was insolvent, that a proceeding against the transferor is useless and the value of the property transferred.

The Government showed that taxpayer was a stockholder of the corporation involved under Illinois law and a stockholder of a dissolved corporation is a transferee within the meaning of Section 311. Taxpayer's stock was transferred to the partnership which was formed for the purpose of taking over the corporation's assets and continuing the business of the corporation. In exchange for the stock transferred to the partnership, taxpayer received a 10% interest in the partnership of an agreed value of $12,000. The assets of the corporation were transferred to the partnership. This left the corporation without anything of value and the corporation was dis-

solved. Accordingly, the Government established a *prima facie* case and sustained its burden of proof. The burden of going forward was on taxpayer and the District Court properly found that this burden was not sustained.

If the corporation had physically distributed the assets to taxpayer who then transferred them to the partnership in exchange for an interest in the partnership, there would not be any doubt that taxpayer would be liable as a transferee. Here, there was receipt in fact by the partnership of the corporate assets. The partnership was formed for the purpose of taking over the corporate assets and of continuing the corporation's business. The receipt by the partnership was on behalf of the partners who had received their partnership interest in exchange for and on the basis of their ownership of the corporation's stock. This receipt of the assets by the partnership was a constructive receipt by taxpayer who affirmed her interest in the partnership and was entitled to receive benefits from the partnership. The substance and effect of the transactions are the same.

The partnership agreement was competent to show taxpayer's ownership of the stock since taxpayer recognized and ratified the agreement in her verified complaint for dissolution of the partnership and an accounting. Taxpayer also recognized and ratified the partnership by filing her individual income tax return for 1944 reporting only one item of income which was her distributable share of the partnership income, by executing transferee agreements admitting that she was a transferee of the assets of the corporation involved, by executing various consents extending the periods of limitation upon assessment of transferee liability, and by executing a waiver of restrictions on assessment and collection of deficiency which stated her liability as a transferee of the corporation.

Taxpayer erroneously asserts that the assessment was invalid because the waiver was ineffective and no notice of deficiency was sent to her. Plainly the statute giving a taxpayer the right to file a waiver of restrictions on assessment does not mean filing the waiver with the Commissioner himself. A proper filing in the local office occurred here and the waiver obviated the need of sending a notice of deficiency.

Taxpayer cannot repudiate the partnership on the ground that it was a fiction and thereby manipulate her tax consequences. As this Court said in *Maletis v. United States,* the Commissioner should have the sole power to sustain or disregard the partnership if in fact it is unreal. "That which best serves the purpose of the tax statute should govern" and not the yearly exigencies of the taxpayer.

The District Court properly found definite facts pertaining to the contested matters. The District Court was not required to make overdetailed findings.

Taxpayer's liability as a transferee is her personal liability. The debts of the partnership are not involved and, therefore, taxpayer's liability as a limited partner for the debts of the partnership is immaterial. Since no payment of taxes assessed against the corporation was made on taxpayer's behalf, her argument of payment by others of an assessment against the corporation for years prior to those involved here is without substance.

The District Court, therefore, correctly held that the taxpayer was liable as a transferee under Section 311, Internal Revenue Code of 1939, since all of the corporate assets were transferred to the partnership and, in accordance with the partnership agreement which taxpayer ratified, she received 10% interest in the partnership in exchange for her corporate stock.

ARGUMENT.

The District Court Correctly Held That Taxpayer Was Liable as a Transferee Under Section 311, Internal Revenue Code of 1939, Since All of the Corporate Assets Were Transferred to the Partnership and, in Accordance With the Partnership Agreement Which Taxpayer Ratified, She Received a 10% Interest in the Partnership in Exchange for Her Corporate Stock

A. The Applicable Law.

A transferee of a taxpayer's property is liable, under Section 311, Internal Revenue Code of 1939, *supra,* at law or in equity, for the tax owed by the transferor to the extent of the value of the property received by the transferee. The remedy stated in Section 311 was intended to provide a more effective and summary method of collecting the tax whenever a taxpayer transferred his property and became unable to pay his tax. *Phillips v. Commissioner,* 283 U. S. 589; *Commissioner v. Stern,* 355 U. S. 810.

Under Section 311, whether a transferee is liable, at law or in equity, is determined by state law. *Commissioner v. Stern, supra; United States v. Bess,* 355 U. S. 861. The state law applicable here is that of Illinois, as taxpayer agrees (Br. 18), since the transferor was an Illinois corporation located in Illinois, its assets were transferred in Illinois to a partnership located in Illinois, the partnership agreement was ratified in Illinois, and the parties to the partnership agreement resided in Illinois. [R. 53-54, 140-142, 159.]

B. The Evidence Shows That the Government Sustained Its Burden of Proof.

The burden of proving transferee liability is on the Government. See Section 1119(a), Internal Revenue Code of 1939; *Phillips v. Commissioner, supra; Wilson v. United States,* 100 F. 2d 552 (C. A. 9th). A *prima facie* case is established when the Government proves that there was a transfer of property without adequate consideration, that as a result of the transfer, the transferor was insolvent, that a proceeding against the transferor is useless and finally the value of the property transferred. *Wilson v. United States, supra; Gobins v. Commissioner,* 18 T. C. 1159, affirmed *per curiam,* 217 F. 2d 952 (C. A. 9th); *Nau v. Commissioner,* 27 T. C. 999, affirmed (C. A. 6th) on November 26, 1958 (58-2 U. S. T. C., ¶9963); *Fairless v. Commissioner,* 67 F. 2d 475 (C. A. 6th). The District Court's implicit conclusion that the Government sustained its burden is fully justified.

A stockholder of a dissolved corporation is a transferee within the meaning of Section 311. *Kieferdorf v. Commissioner,* 142 F. 2d 723 (C. A. 9th), certiorari denied, 323 U. S. 733; Treasury Regulations 111, Section 29.311-1, *supra.* Under Illinois law, taxpayer was a stockholder of the corporation involved prior to its dissolution, as the District Court found. [R. 49.] She owned 80 shares of stock as set forth in the partnership agreement. [R. 141.] She argues that the partnership agreement was not competent evidence to show her stock ownership.[2] (Br. 24-27.) The Government introduced

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[2]Taxpayer asserts that the District Court should have found that she never owned any stock because of her testimony that she did not know anything about the transactions. (Br. 23-24.) It is settled that the trial court is not bound to accept self-serving statements of a witness especially where, as here, the testimony was not wholly

into evidence taxpayer's complaint for dissolution of the partnership and an accounting. [Ex. T; R. 53-54, 159.] The complaint was introduced to show taxpayer's admission of her interest in the partnership and the prayer for dissolution and an accounting. [R. 99.] Expressly incorporated in the complaint as Exhibit A was the partnership agreement which set forth the basis for taxpayer's claim of an interest in the partnership. [R. 140, 160.] Without the partnership agreement, the complaint for dissolution and an accounting was incomplete and failed to show how taxpayer could claim a partnership interest. Certainly the trial court is not required to close its eyes to that which was clearly a part of the complaint and was in evidence. [R. 100.] Taxpayer did not object when the Government's counsel stated that the complaint for

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consistent with itself, it was uncorroborated, it conflicted with documentary evidence and it was inherently improbable in the light of the circumstances. It is the trial court's duty to observe the witness and to weigh the evidence. *Quock Ting v. United States,* 140 U. S. 417; *Joe Balestrieri & Co. v. Commissioner,* 177 F. 2d 867, 875 (C. A. 9th); *Wilson v. United States, supra,* p. 555.

Taxpayer also asserts that the partnership was the sole stockholder of the corporation at the time of the dissolution and transfer of the corporate assets. (Br. 20-23.) This, however, is beside the point. The partners were the sole stockholders prior to the formation of the partnership. [R. 140.] The partnership was formed for the express purpose of taking over the assets of the corporation and continuing the operation of the business of the corporation. [R. 141.] And the pre-trial conference order expressly states [R. 12]: "Prior to said transfer of assets the shareholders of said corporation transferred their stock in said corporation to the said entity, Borin Art Products Company," the partnership. In exchange for this transfer of stock to the partnership, the partners received their partnership interest. [R. 141-142, 143-145.] The assertion that taxpayer's ownership of the stock prior to the formation of the partnership was immaterial (Br. 23) is plainly wrong.

Although taxpayer says the contents of the partnership agreement are not competent evidence against her, an extensive argument is made in the brief based upon the contents of the partnership agreement and intended to repudiate the partnership. (Br. 37-41.) The argument is not made as an inconsistent alternative argument.

dissolution was offered to show the truth of the allegations therein. [R. 99, 137.] To argue that the partnership agreement was not competent evidence to show her stock ownership, therefore, is wrong and the District Court properly considered the evidence [R. 49, 138-139] and properly denied the motion for new trial. [See R. 59-70; Br. 28-30.]

Of course taxpayer is bound by the partnership agreement, even though she did not sign it, because, as the District Court found, "she recognized and ratified the partnership agreement." [R. 53.] Illinois recognizes that a person may ratify an instrument even though the affixing of his signature initially was a forgery. In *Fay v. Slaughter,* 194 Ill. 157, 62 N. E. 592, the Supreme Court of Illinois said (p. 167):

> * * * the above authorities are to the effect that when a forgery is committed there can be no pretense of authority, and, as is said in *Henry v. Heeb, supra:* "It is difficult to understand how one who is, in a sense, the victim of the criminal act, may adopt or ratify it." By the decisions of this State he might do so, but he would only be held to do so when it was shown that with a full knowledge of all the material facts he did ratify it. *Livings v. Wiler,* 32 Ill. 387; *Hefner v. Vandolah,* 57 id. 520; *Chicago Edison Co. v. Fay,* 164 id. 323.

And as the Supreme Court of Illinois said in *Vetesnik v. Magull,* 347 Ill. 611, 617, 180 N. E. 390:

> It is an established rule of agency that a subsequent ratification of the act of the agent is equivalent to an original authorization, and an agreement concluded by the agent and so ratified cannot, in the absence of the express consent of the other party, be limited to a part of the agreement. Such agree-

> ment is a unit and must either be ratified or rejected as a whole. The acceptance of a part with full knowledge is constructively an acceptance of the whole. (*Morris v. Tillson,* 81 Ill. 607; *Gaines v. Miller,* 11 U. S. 395, 28 L. ed. 466.) Justice does not permit one to accept the part of a transaction beneficial to him and repudiate that part detrimental.

See also *Magid v. Drexel Nat. Bank,* 330 Ill. App. 486, 71 N. E. 2d 898; *Commercial Loan & Trust Co. v. Mallers,* 141 Ill. App. 460, affirmed, 237 Ill. 119, 86 N. E. 728. Taxpayer unequivocally recognized and ratified the partnership agreement in her verified complaint for dissolution of the partnership and an accounting. [R. 53-54.]

Taxpayer's argument (Br. 45-54) that the doctrine of ratification is not applicable and that the doctrine of estoppel is applicable is plainly without merit. The cases cited by taxpayer, *Hefner v. Dawson,* 63 Ill. 403, and *Chicago Edison Co. v. Fay,* 164 Ill. 323, 329, 45 N. E. 534 (Br. 46), are not contrary to the Government's contentions in the preceding paragraph. In *Chicago Edison Co. v. Fay,* the Illinois Court cited *Hefner v. Dawson, supra,* and reaffirmed its position with respect to ratification of a forgery but it stated that ratification will not be implied in doubtful circumstances. The court said (p. 329):

> While this court has held that a forged note may be ratified by the principal so as to bind him (*Livings v. Wiler,* 32 Ill. 387, *Hefner v. Vandolah,* 62 id. 483, and *Hefner v. Dawson,* 63 id. 403), it has not, to our knowledge, been held in any case that a ratification of a forged instrument can be implied from a doubtful state of facts.

A doubtful state of facts does not exist here; the ratification is clear. In addition to the verified complaint for

dissolution of the partnership and an accounting, which complaint expressly incorporates therein as Exhibit A the partnership agreement, taxpayer filed her individual income tax return for the year 1944 reporting only one item of income which was her distributable share of the partnership income. The tax as shown on the return was paid. [R. 54.] Taxpayer also executed transferee agreements admitting that she was a transferee of the assets of the corporation involved and agreed to pay the amount of any federal income or excess profits tax to the extent of her transferee liability. [R. 50-51.] In addition, taxpayer executed various consents extending the periods of limitation upon assessment of transferee liability and taxpayer executed a waiver of restrictions on assessment and collection of deficiency which stated her liability as a transferee of the corporation. [R. 50, 52.] Plainly these acts constitute clear recognition and ratification of the partnership and taxpayer's interest therein acquired by virtue of her 80 share ownership in the corporation.

Accordingly, we have shown that the evidence fully justified the District Court's finding that taxpayer owned 80 shares of the stock prior to the dissolution of the corporation.[3] Taxpayer does not dispute that all of the corporate assets were taken over by the partnership which

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[3]The Illinois Stock Transfer Act (32 Smith-Hurd Illinois Annotated Statutes, Section 416) which requires delivery of the certificate does not invalidate taxpayer's ownership of the stock. *Chicago Title & Trust Co. v. Ward*, 332 Ill. 126, 163 N. E. 319; *In re Antkowskis' Estates*, 286 Ill. App. 184, 3 N. E. 2d 132. The Illinois Court said in *In re Antkowskis' Estates*, pp. 195-196, "the rights of parties as between themselves are not affected by the provisions of the Uniform Stock Transfer Act, and that it was not the intention of the legislature to change the rule of law applicable as between the immediate parties of the transaction." Thus, taxpayer's ownership of the 80 shares is unquestionable since she and her husband recognized that ownership in the partnership agreement.

was formed for the purpose of continuing the corporation's business. [R. 49, 141.] Nor does taxpayer dispute the fact that after this transfer the corporation was insolvent and was dissolved, and that a proceeding against the corporation is useless. [R. 53.] Although taxpayer disputes the District Court's finding that the value of the property received by taxpayer was the $12,000 agreed value of the 10% partnership interest (Br. 43-44), it certainly was not unreasonable for the District Court to accept the parties' determination of the value of the partnership interest. See *Stokes v. Commissioner,* 22 T. C. 415; *Cury v. Commissioner,* 23 T. C. 305; *Newcomb v. Commissioner,* 23 T. C. 954; *Miller v. Commissioner,* 235 F. 2d 553 (C. A. 6th). Thus, under Illinois law, taxpayer would be liable as a transferee. See *Bouton v. Smith,* 113 Ill. 481; *Dillman v. Nadelhoffer,* 162 Ill. 625, 45 N. E. 680; *Birney v. Solomon,* 348 Ill. 410, 181 N. E. 318; *Second Nat. Bank of Robinson v. Jones,* 309 Ill. App. 358, 33 N. E. 2d 732; *La Crosse Mfg. Co. v. Springer,* 323 Ill. App. 525, 56 N. E. 2d 146; *Landers Frary & Clark v. Vischer Products Co.,* 201 F. 2d 319 (C. A. 7th).

Since the Government established all the elements necessary to form a *prima facie* case, the burden of going forward was on taxpayer. *Gobins v. Commissioner, supra; Robinette v. Commissioner,* 139 F. 2d 285 (C. A. 6th), certiorari denied, 322 U. S. 745, rehearing denied, 322 U. S. 772; *Reinecke v. Commissioner,* 220 F. 2d 406 (C. A. 8th). This burden of going forward is the meaning of the District Court's conclusion that "The defendant has not sustained her burden of proving that she is not liable, at law or in equity, as transferee of the assets of Borin Art Products Corporation, for deficiencies in taxes assessed against said Corporation". [R. 56.]

Therefore, taxpayer incorrectly argues under Point I, Br. 11-20, that "the trial court erred in assuming as a matter of law that appellant had the burden of proving that she was not liable as transferee of the assets of Borin Art Products Corporation."

Taxpayer misstates the facts when she says that the Government did not allege nonpayment of the taxes by the transferor-corporation. The Government alleged nonpayment by the transferor-corporation [R. 4] and introduced into evidence Exhibit V, certificate of assessments, which showed that the tax was not paid. [R. 101.] The District Court found nonpayment by the transferor-corporation. [R. 49.]

C. Taxpayer's Erroneous Arguments.

1. The Waiver Was Valid.

Taxpayer erroneously contends that the assessment "rests on very infirm ground" because the waiver was not actually filed with the Commissioner and no notice of deficiency was sent to her. (Br. 16.) The District Court found that a waiver of restrictions on assessment and collection of deficiency in tax and acceptance of over-assessment was executed by taxpayer on or about March 19, 1951. [R. 52.] Stamped on the waiver is the Internal Revenue Service date of receipt, March 19, 1951. Unmistakably this is actual filing with the Commissioner; plainly the statute does not contemplate a filing with the Commissioner himself. *Moore v. Cleveland Ry. Co.,* 108 F. 2d 656, 660-661 (C. A. 6th). See also *Auerbach Shoe Co. v. Commissioner,* 216 F. 2d 693 (C. A. 1st); *Payson v. Commissioner,* 166 F. 2d 1008 (C. A. 2d); *Roos v. United States,* 31 F. Supp. 144 (C. Cls.); *Associated Mutuals v. Delaney,* 176 F. 2d 179 (C. A. 1st).

"The waiver obviated the need of sending the formal deficiency notice * * *." *Monge v. Smyth,* 229 F. 2d 361, 368 (C. A. 9th), certiorari denied, 351 U. S. 976; *Girard v. Gill,* 243 F. 2d 166 (C. A. 4th). See also *Daugette v. Patterson,* 250 F. 2d 753 (C. A. 5th), certiorari denied, 356 U. S. 902; *Cain v. United States,* 255 F. 2d 193 (C. A. 8th). *Steiner v. Nelson* (C. A. 7th), decided October 16, 1958 (58-2 U. S. T. C., ¶9871), relied on by taxpayer (Br 16), is not applicable because on the Form 870M there involved was a statement that the waiver was not valid unless accepted by the Commissioner. The Seventh Circuit found that the Commissioner had not accepted the waiver. There is not a similar clause on the waiver, Form 874, involved here. Certainly the Commissioner accepted and relied on the waiver here in making his assessment on June 15, 1951, without having sent the notice of deficiency. [R. 52.] See *Girard v. Gill, supra.*

The District Court found that taxpayer negotiated with the Internal Revenue Service through her attorneys or accountants and followed their advice and recommendations pertaining to her liability. [R. 55.] That taxpayer may have been misled by her attorneys or accountants with respect to the waiver, as she claims (Br. 16-17), does not vitiate the effect of the waiver. *Monge v. Smyth, supra,* p. 366. See also *Wheeler v. Holland,* 120 F. Supp. 383 (N. D. Ga.), affirmed, 218 F. 2d 482 (C. A. 5th). And even if taxpayer did not understand the nature of the waiver due to statements by her representatives, or because she neglected to read the waiver which on its face

was plainly different from the extension of time instruments, at most this is a unilateral mistake and it is well settled that such a mistake does not render the waiver invalid. See *Seymour v. Mackay,* 126 Ill. 341, 351, 18 N. E. 552, 553; *Shulman v. Moser,* 284 Ill. 134, 140, 119 N. E. 936, 938; *Flannery v. Flannery,* 320 Ill. App. 421, 431, 51 N. E. 2d 349, 354; *Chicago Title & Trust Co. v. City of Chicago,* 321 Ill. App. 271, 276, 52 N. E. 2d 1019, 1021-1022.

2. Taxpayer Cannot Repudiate the Partnership.

We have already shown and the District Court has found that taxpayer recognized and ratified the partnership. She now attempts to repudiate the partnership on the ground that in fact a true and bona fide partnership did not exist. (Br. 31-41.) However, the controlling principle has been stated as follows by this Court in *Maletis v. United States,* 200 F. 2d 97, 98:

> As was said in *Higgins v. Smith,* 308 U. S. 473, at page 477, 60 S. Ct. 355, at page 358, 84 L. Ed. 406:
>
> > The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purpose of the tax statute.
>
> *   *   *   *   *   *   *   *
>
> The Bureau of Internal Revenue, with the tremendous load it carries, must necessarily rely in the vast majority of cases on what the taxpayer asserts to be fact. The burden is on the taxpayer to see to it that the form of business he has created for tax purposes, and has asserted in his returns to be valid,

> is in fact not a sham or unreal. *If in fact it is unreal, then it is not he but the Commissioner who should have the sole power to sustain or disregard the effect of the fiction since otherwise the opportunities for manipulation of taxes are practically unchecked.* That which best serves the purpose of the tax statute should govern in this field and not the yearly exigencies of this taxpayer. (Italics supplied.)

Therefore, this taxpayer cannot now repudiate the partnership on the ground that it was a fiction and thereby manipulate her tax consequences.

This case is not like *Jacob v. Commissioner,* 139 F. 2d 277 (C. A. 9th), which is cited by taxpayer. (Br. 32.) This Court denied transferee liability in that case because of its finding that no gift of the Central Holding Company stock or other funds was made to the wife or children against whom transferee liability was being asserted. In the opinion it was stated (p. 279):

> However, Jacob testified that his intention was to give his wife and children an interest in a going concern in the form of stock, but that the making of gifts of cash was not within his purpose. * * * True, also Jacob caused his shares to be reissued in petitioners' names, but this was after the fire and at a time when he appears already to have made up his mind to get out of the corporation and to give the shares to Barnes. * * *
>
> * * * * * * * *
>
> The most the record can be said to show is that Jacob made to his family an Indian gift of the corporate stock while contemporaneously appropriating to himself a share of the corporate funds.

Here we have shown that the District Court properly found [R. 49-50] that taxpayer owned 80 shares of corporate stock prior to the dissolution and she received a 10% interest in the partnership in exchange for her stock.[4]

3. The District Court Properly Found the Facts.

Taxpayer claims that the District Court failed in its obligation to find the facts "by failing to include in its findings all the pertinent and uncontradicted facts shown by the evidence, as detailed in the proposed findings [R. 24-32], filed by appellant." (Br. 12-13.) Surely the trial court does not have an obligation to find the facts as proposed by a particular party to the proceeding. Obviously these proposed findings may be objectionable. The trial judge fulfills his obligation when he finds definite facts pertinent to the contested matters. *United States v. Forness,* 125 F. 2d 928, 942-943 (C. A. 2d), certiorari denied *sub nom. City of Salamanca v. United States,* 316 U. S. 694. This Court has said that "The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the

[4]It is well settled that the trial judge properly excludes irrelevant evidence. Taxpayer asserts, nevertheless, that the divorce decree should have been admitted to show that the partnership was not recognized in the Illinois decree. (Br. 36.) This decree, which apparently did not specifically pass upon the validity of the partnership, was plainly immaterial in view of the representations of the taxpayer that such a partnership existed. Moreover, federal law and not a decree in a local proceeding for divorce determines the validity of a partnership for tax purposes. *Cf. Commissioner v. Tower,* 327 U. S. 280. Thus, the decree was properly excluded. [R. 134.]

trial court reached its decision." *Irish v. United States*, 225 F. 2d 3, 8. We submit that explicit and fully comprehensive findings were made here which reveal clearly on this appeal the basis of the District Court's decision. Manifestly, overdetailed findings—contrary to taxpayer's contention—are not required.

4. The Trust Fund Doctrine Is Applicable.

Taxpayer says that as a result of a conveyance in fraud of creditors the assets became a trust fund but that there is no equity to support the trust fund doctrine here. (Br. 19.) The defect in taxpayer's argument results from her insistence that she never received assets from the corporation. (Br. 19-20.) If receipt in fact of the assets were the sole criterion for application of the trust fund doctrine, the slightest subterfuge would deprive the creditor of a meaningful remedy. The whole purpose of the trust fund remedy is to give the creditor a meaningful opportunity to obtain satisfaction for the debt owed to him. Here, there was receipt in fact by the partnership of the corporate assets. The partnership was formed for the purpose of taking over the corporate assets and of continuing the corporation's business. The receipt by the partnership was on behalf of the partners who had received their partnership interest in exchange for and on the basis of their ownership of corporate stock. This receipt of the assets by the partnership is constructive receipt by taxpayer.[5] Taxpayer affirmed her interest in the

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[5]The result here is the same as if the assets of the corporation had been physically turned over to the taxpayer and she in turn physically delivered them to the partnership.

partnership and was entitled to receive benefits from the partnership. She is liable, therefore, to the extent of her interest in the partnership which in fact received the corporate assets. If the corporation had physically distributed the assets to taxpayer who then transferred them to the partnership in exchange for an interest in the partnership, would there be any doubt that taxpayer would be liable as a transferee? *California Iron Yards Corp. v. Commissioner,* 82 F. 2d 776 (C. A. 9th); *Fairless v. Commissioner,* 67 F. 2d 475 (C. A. 6th); *Hunn v. United States,* 60 F. 2d 430 (C. A. 8th); *Bates Motor Trans. Lines v. Commissioner,* 200 F. 2d 20 (C. A. 7th); *Caire v. Commissioner,* 101 F. 2d 992 (C. A. 5th). That the stock was transferred to the partnership for an interest therein and the partnership received the corporate assets does not insulate taxpayer from transferee liability. The substance and net effect of the transactions are the same.

Vendig v. Commissioner, 229 F. 2d 93 (C. A. 2d), cited by taxpayer (Br. 21) is distinguishable.[6] In that case, the Second Circuit said (p. 95):

> * * * exchanging stock of Sales [the liquidated corporation] for stock of Mavco [the liquidating corporation] petitioner did not remove cash or other property from Sales, thereby harming creditors of Sales who were entitled to be paid before any distributions to shareholders.

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[6]In distinguishing the *Vendig* case from the *Bates Motor Trans. Lines* case, *supra,* the court pointed out that Chaddick (the transferee in the *Bates* case) was in full control of the two corporations involved whereas Eleanor Vendig did not even own voting stock (p. 95, fn. 3).

Here, the stock was transferred to the partnership for an interest therein and the only purpose of the partnership was to take over the corporate assets and to conduct the corporation's business. This is clearly a removal of the corporate assets—although circuitously—thus the situation here is not analogous to that in the *Vendig* case.

5. Debts of the Partnership Are Not Involved.

Taxpayer further argues that under Illinois law as a limited partner she was not liable for any of the debts of the partnership. (Br. 57.) Taxpayer's transferee liability here is her individual liability; not liability as a partner for a debt of the partnership. It is immaterial, therefore, to what extent taxpayer may be liable as a limited partner for a debt of the partnership.

6. No Prior Payment on Behalf of Taxpayer.

Finally, taxpayer contends that payment by others of the corporation's taxes for years prior to those involved here extinguished her transferee liability. (Br. 58.) Taxpayer does not claim that the payments were made on her behalf or with the intent to discharge her liability. Her contention, therefore, is plainly without substance.

Conclusion.

Since the Government sustained its burden of proof, the District Court correctly held that taxpayer was liable as a transferee under Section 311, Internal Revenue Code of 1939, because all of the corporate assets were transferred to the partnership and, in accordance with the partnership agreement which taxpayer ratified, she re-

ceived a 10% interest in the partnership in exchange for her corporate stock. The judgment of the District Court should be affirmed.

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